IN THE

# Supreme Court of the United States

OCTOBER TERM—1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES, INCORPORATED, AMERICAN BARGE LINE COMPANY AND FEDERAL BARGE LINES, INC.,

Appellants,

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

## BRIEF FOR THE APPELLEES, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

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## BRIEF FOR THE APPELLEES, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

### Statutes and Regulations Involved

In setting out the statutes involved, the briefs filed by the appellants and the United States omit the following:

Section 15(6) of the Interstate Commerce Act [41 Stat. 486; 49 U. S. C. 15(6)]:

Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

Rules 20, 28, and 30(a) of the General Rules of Practice Before The Commission In Proceedings Under The Interstate Commerce Act And Related Acts [Federal Register, August 14, 1942, p. 6395, *et sequitur*, Title 49, Chapter I, Subchapter A, Part 1, sections 1.20, 1.28 and 1.30(a)].

*Rule 20. Amendments.* Leave to file amendments to any pleading will be allowed or denied as a matter of discretion.

*Rule 28. Formal complaints: Allegations generally.* A formal complaint should be so drawn as fully and completely to advise the parties defendant and the Commission in what respects the provisions of the act have been or are violated or will be violated, and should set forth briefly and in plain language the facts claimed to constitute such violation. If two or more sections or subsections of the act or requirements established pursuant thereto are alleged to be violated, the facts claimed to constitute violation of one section, subsection, or requirement should be stated separately from those claimed to constitute a violation of another section, subsection, or requirement whenever that can be done by reference or otherwise without undue repetition.

*Rule 30. Formal complaints: Discrimination, preference, and prejudice.*—(a) Generally.—A complaint that alleges the act is violated because of an undue or unreasonable preference or advantage, undue or unreasonable prejudice or disadvantage, or unjust discrimination should specify clearly the particular elements stated in the act as constituting such violation and the facts which complainant relies upon to establish it.

## Questions Presented

In a preamble under "Questions Presented" at page 3 of their brief, the appellants state that:

> "The services rendered by the said railroads from East St. Louis to Danville on the ex-barge sulphur are the same as on the through all-rail sulphur."

This statement has no factual support in the record. The same error is repeated in appellants' Question No. 2.

In a preamble under "Questions Presented" at page 2 of its brief, the United States alleges that:

> "The result (of the joint all-rail rate and the absence of a comparable joint barge-rail rate) has been to eliminate the barges from carrying this traffic."

This is an unwarranted conclusion without factual support in the record.

Appellants' Question No. 1 was not raised in their complaint before the Commission. It was specifically disclaimed by counsel for the appellants (R. 148). Accordingly, appellants' attempt to inject the question here necessitates a preliminary inquiry:

> Whether appellants' Question No. 1 is properly before the Court.

A brief resume of the proceedings since the original complaint makes it quite clear that the other questions presented by the appellants are mere sham. Thus, while they filed the standard form of broad complaint in the lower court, the appellants' Motion For New Trial (R. 57) stated as follows:

> "Plaintiffs sought review of the Commission's decision *only* because it held *as a m[illegible] of law* that

divisions of through rates are *not* charges within the meaning of the section cited."

Thus, the primary question raised before this Court is the one which was not raised in the complaint filed with the Commission.

## STATEMENT OF THE CASE

### I

### The Proceedings Before The Commission

In I. C. C. Docket No. 30761, *American Barge Line Company, et al.* v. *Chicago and Eastern Illinois Railroad Company, et al.*, 291 I. C. C. 422, the appellants, common carriers by water on the Mississippi River and the Gulf Intracoastal Canal, filed a formal complaint against the intervening appellees, four railroad companies operating between East St. Louis and Danville, Illinois.

The complaint alleged: (1) that the railroad appellees maintain joint rates over through all-rail routes from Galveston, Texas, to Danville, Illinois, while refusing to join bargeline appellants in *joint differential rates* over through barge-and-rail routes; (2) that as a result the existing rates and charges over barge-and-rail routes from Galveston to Danville are *excessive and unreasonable;* (3) that it is *necessary or desirable in the public interest* to establish such through barge-rail routes and joint rates *with reasonable differentials* under the all-rail rates; and (4) that said refusal of the railroads is in violation of sections 1 and 307(d) of the Interstate Commerce Act, and that defendants are maintaining rates and charges which are discriminatory against complainants as connecting carriers in violation of section 3(4) of the Act (R. 63, 64).

The complaint also alleged (Paragraph IV) that the railroads had subsequently published a reduction in the all-rail rate "which augments and aggravates" the discrimination against the barge lines (R. 63). That reduction, however, was suspended by the Commission and subsequently withdrawn (R. 94). It plays no further part in this proceeding.

At the conclusion of their complaint the appellants prayed that the railroads be required (1) to cease and desist from the aforesaid violations of the Act, and (2) to establish such through routes and joint rates as the Commission *may deem reasonable and just* and otherwise lawful (R. 64).

The Galveston Chamber of Commerce intervened, but submitted no evidence. The American Waterways Operators, Inc., also intervened, but did not appear at the hearing and submitted no evidence. Neither Dixie Carriers nor Coyle Lines submitted evidence.

The appellants' testimony was substantially as follows:

Barge-rail rates are published from Port Sulphur, Louisiana, to Joliet and Danville, Illinois. The joint barge-rail rate at present is $6.66 per gross ton. No joint barge-rail rates have ever been published on sulphur from Galveston, Texas, to any point.

Federal maintains joint all-water rates with Dixie and Coyle from Galveston to Upper River Ports, such as East St. Louis. The rates are generally $1.01 per gross ton over Federal's local rates from Port Sulphur.

At the request of a shipper (the purest of hearsay!) Federal filed a proposal for a joint barge-rail rate from Galveston to Danville of $7.67 per gross ton with the Illinois Freight Assn. on December 27, 1949. The proposal was not recommended (R. 77-79).

The price of sulphur loaded in barges at Galveston, Texas, is $1.50 per gross ton higher than on sulphur loaded into rail cars at Texas mines. Adding the $1.50 price differential would make the charges via the proposed barge-rail route from Galveston to Danville $9.17 per gross ton, as compared with the all-rail rate of $9.184 from Texas mines to Danville. The barge lines were told they would be able to get the traffic with a difference of 1.4¢ per ton because of *some absorption made in the transportation charge from Galveston to New Orleans* (R. 80-82).

The barge lines propose to retain $5.41 out of the proposed rate of $7.67, leaving $2.26 for the rail carriers. The present water rate from Galveston to East St. Louis is $5.32 per gross ton (R. 83).

There has been a barge-rail movement of sulphur from Galveston to Danville, but not by Federal Barge Line. The water leg of the haul was performed by a contract carrier, Commercial Petroleum Transport (R. 87-88). The tonnage approximates 20,000 tons per year and has moved for the past two or three months via all-rail (R. 93).

The appellees' testimony was substantially as follows:

The present rail rates from Galveston to Danville are depressed rates established to meet barge competition, and are thus substantially below the normal basis (R. 95, 96, 116). The preponderance of the traffic during the last six months of 1950 moved via barge-rail (R. 101).

The barge-rail charges from Galveston to Danville via contract carrier aggregate $8.00 per gross ton. The contract carrier barge charge is $4.65 per gross ton as contrasted with Federal's local rate of $5.32. The aggregate barge-rail charge via Federal is $8.71 per gross ton, which includes handling charges of 44¢ (R. 101, 102, 117).

The railroads are not amenable to joining in through single-factor rates from Galveston to Danville. In the

first place, it would reduce railroad earnings beyond East St. Louis (R. 104, 105). The Wabash is participating at present in a barge-rail movement (R. 112).

On December 22, 1952, the Commission, Division 3, dismissed the complaint. The Division found (287 I. C. C. 403) that while there had been no movement on the assailed barge-rail combination rate, the preponderance of the sulphur traffic from Galveston to Danville during the last six months of 1950 had moved by contract carrier barge to East St. Louis and rail beyond. It was further found that the rail rates from Galveston to Danville and from East St. Louis to Danville were on a depressed basis. The barge lines demand $5.41 as a division of their proposed rate of $7.67, as contrasted with their present local rate from Galveston to East St. Louis of $5.32 per gross ton.

No shippers appeared in support of the proposed rate at the hearing.

There is no evidence of record to warrant a finding that the present barge-rail combination rate is unreasonable. There is no showing that the proposed joint through one-factor rate is necessary or desirable in the public interest under Section 307(d) of the Act. The National Transportation Policy does not require the Commission, in the fair and impartial regulation of all modes of transportation, to force rail carriers, whose rates are already depressed to meet barge competition, to further depress their earnings to favor that competition. If the barge lines desire to participate in the transportation, they may do so by reducing their own rate from Galveston to East St. Louis. It was further found that the evidence would not sustain the barge lines' allegation under Section 3(4) of the Act (R. 22-28).

Following the decision of Division 3, the appellants filed their Petition for Reconsideration. This petition

and the oral argument that followed were confined to the issue which arises under paragraph 4 of Section 3 of the Act as applied to the question of joint through one-factor rates. The appellants' present argument under Section 3(4) on the question of divisions versus local rates was not one of the issues raised in their complaint and was specifically disclaimed on oral argument, as follows:

> Commr. Alldredge: Are you asking for establishment of joint through rates or simply the removal of discrimination, either that way, or through the establishment of proportional rail rates?
>
> Mr. Belnap: No, we are asking for joint through rates and urge you that this is the necessary step to remove the discrimination demonstrated.
>
> Commr. Alldredge: If the Commission required the railroads to establish beyond East St. Louis a proportional rate—
>
> Mr. Belnap: Equivalent to their division, that would be one method of curing the thing about which we complain, but *that isn't the relief we have asked. I don't believe that is really one of the issues of our complaint* because our complaint asks for through, joint through rates to cure the discrimination (R. 147-148).

On January 19, 1954, the full Commission issued its Report and Order On Reconsideration, dismissing the complaint. The pertinent parts of that decision follow:

> "the record affords no support for a finding that the present combination barge-rail rate 91.4 cents (per gross ton) lower than the present all-rail rate, is unreasonable for the through service offered thereunder. There is also no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate . . . and the suggested barge-rail rate from Galveston, or any par-

ticular differential, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation. The complainants cited decisions in which such rate differences were prescribed, *but the prescriptions were based upon a presentation of adequate evidence, which was not the case here.*" (R. 30)

"Here, no shipper has evidenced an interest in the rate sought, and the rate over the all-rail route which it is intended to meet is on a depressed basis. In these circumstances, we cannot find that the public interest requires the establishment of the joint barge-rail rate sought." (R. 31)

(None of the findings thus far quoted were challenged before the lower court.)

"At the oral argument counsel for complainants agreed that one way the alleged discrimination could be removed would be by the use of $2.26 as a proportional rate for the services of the defendants operating from East St. Louis to Danville . . . He stated, however, that he did not believe that that was one of the issues of their complaint. This belief appears to be correct" (R. 31)

(Appellants now seek a reversal of the Commission's entire decision on a point not raised in their complaint. See Appellants' Question No. 1.)

"The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers and is of unlike things. Basically, divisions of joint rates are the result of contractual arrangements between carriers; they are not rates or charges as those terms are used in Section 3(4) of the Act." (R. 32)

"The rail rate of $2.95 from East St. Louis to Danville, used as a component of the through combination barge-rail rate on complainants' traffic . . . is also used for similar application on sulphur carried from Galveston to East St. Louis by contract carriers by barge. It will also apply on sulphur moved to East St. Louis by rail carriers not parties to joint rates. The depressed character of this rate (is) . . . shown by its comparison with noncompetitive rail rates . . . in the same general area. A proposal of defendants to further reduce the application of the same rate . . . was suspended *upon protest of the barge lines* . . . Had that rate been permitted to become effective the rate from East St. Louis to Danville would now be approximately the same as the rail division . . . but such a rate would then have been available to the traffic of all carriers not parties to joint rates . . . including traffic moved into East St. Louis by contract carriers by barge." (R. 32)

The Commission found that the total cost of the barge transportation was $4.32 per gross ton as contrasted with the local rate of $5.32 per gross ton and the suggested component of $5.41 on the proposed joint rate. The Commission then observed "that if any reduction in the barge-rail charge from Galveston to Danville is needed, it ought to come out of the barge factor and not out of the depressed rail factor" (R. 32-33).

## II

## The Proceedings Before The Lower Court

On May 24, 1955, the appellants filed their complaint in the District Court, seeking reversal of the Commission's decision. The court complaint recounted the pro-

ceedings before the Commission as follows: "In said complaint (before the Commission) plaintiffs alleged in substance that the said defendants discriminated against them . . . by reason of the failure and refusal of said defendants to join with plaintiffs in a joint through barge-rail rate . . ." (R. 5, 6)

(It will be noted that appellant's description of their own complaint before the Commission does not mention the issue now sought to be raised before this Court by Appellant's Question No. 1.)

The lower court summarized appellants' position as follows:

> "Plaintiffs claimed before the Commission and claim here that under such Act the combination rates and charges on sulphur over barge-rail routes from Galveston . . . to Danville, Illinois, were unreasonable, that they discriminated against Plaintiffs, and that the public interest required that a through barge-rail route and joint through barge-rail rates be established with reasonable differentials, etc." (R. 49)

The Court found that the findings and conclusions of the Commission were adequate, fully supported by the evidence and in full accord with the Act (R. 50). The Court further stated:

> "the Commission in determining the questions was required and we are required to consider not only Plaintiffs desire for and interest in a through . . . route and through joint rate, but the effect thereof if established upon all others concerned," citing *Ayrshire Corporation* v. *United States*, 335 U. S. 573. (R. 50)
>
> "No shipper nor consumer of sulphur nor other person is making common cause with Plaintiffs." (R. 51)

> "When the whole record is considered in the light of all the provisions of the Act . . ., we think Plaintiffs have not shown their claim of discrimination to be meritorious." (R. 52)

Subsequently, appellants filed a Motion for New Trial. The motion states in part:

> "Plaintiffs sought review of the Commission's decision *only* because it held as a matter of law that divisions of through rates are not charges within the meaning of the section cited [3(4)]." (R. 57)
>
> "Plaintiffs further suggest that there be eliminated from the findings all references to the $1.50 per gross ton difference in selling price of sulphur . .. . as being not pertinent to the issues of this case." (R. 59)

The motion for new trial was denied by order of the court, March 28, 1955. This appeal followed.

## III

## The Proceedings Before The Supreme Court

In their Statement As To Jurisdiction, appellants are quoted as follows at page 3:

> "The matter complained of is the charging by said railroads of their . . . local rail rate on ex-barge sulphur originating at Galveston . . . while contemporaneously joining with connecting railroads . . . in a joint through rate . . . out of which said railroads accept a secret contractual division less than said local rate."

Again, the primary matter on appeal bears no resemblance to the original complaint before the Commission.

While they "complain" solely on the issue above, appellants nevertheless present four specific questions:

> (1) Whether a division is a "rate" or "charge" within the meaning of Section 3(4);
>
> (2) Whether the action of a railroad in participating with one connecting carrier in through routes and joint rates, while refusing so to participate with another carrier is, in itself, unlawful under Section 3(4); (Three observations are in order here: (1) The question improperly assumes that the rail carrier performs the same service in each instance; (2) The appellants avoid the question of public interest under Section 15(3); (3) The question of evidence to support a finding of necessity for joint differential barge rates under Section 15(3) and 307(d) is brushed aside.)
>
> (3) Whether the circumstances relied upon by the Commission are sufficient to warrant the difference in treatment; and
>
> (4) Whether the conclusion of the Commission is supported by adequate findings and substantial evidence.

The United States remained silent in the lower court and did not take any affirmative steps in the appeal to the Supreme Court. Its first appearance came in opposition to the Motion to Affirm. It now files a brief presenting two questions, the first of which is:

> (1) Whether the National Transportation Policy requires the Commission in every instance to establish, under Section 307(d) of the Act, joint barge-rail rates differentially related to the all-rail basis.

The Government's second question is substantially the same as appellants' second, except that the government's question contains no reference to through routes.

## Summary of the Argument

Appellants allege that this appeal is based solely upon an error of law by the Commission. The law to be applied, however, and the manner of its application, depend upon the facts of record. Accordingly, we shall treat first with the facts and then with the law.

The appellants' final question inquires whether the Commission's conclusion is supported by adequate findings and substantial evidence. Appellants' brief displays no real interest in that question. These appellees believe, however, that a full understanding of the problem requires at least a brief resume of *all* of the allegations made by appellants, and the evidence, or lack of same, adduced in support thereof.

Under Points I and II, appellees will discuss the issues of reasonableness of the present rates and the necessity or desirability in the public interest of establishing through routes or joint rates.

The appellants did not question these findings in the lower court nor do they challenge them here. Before the Commission, the appellants sought a differential joint rail-barge rate. Their question here is addressed only to a simple joint rate.

The United States contends that a joint barge-rail rate with reasonable differentials is required under the National Transportation Policy. Appellees will demonstrate, however, under Point III that the policy enunciated provides for the welfare of all carriers, does not require special or favored treatment for water carriers under any circumstances, and *cannot be substituted for probative evidence.* Appellants further contend that, as a matter of law, a carrier cannot join with one connecting line in a through route or joint rate and refuse to so join with another. Appellants rely solely on Section 3(4), whereas

the question inevitably involves Section 15(3). Appellees will demonstrate under Point IV that Section 3(4) does not treat of routes and was clearly not intended to deprive the carriers of all discretion in entering into voluntary contractual arrangements, nor was it intended to divest the Commission of its statutory discretion under Section 15(3).

Under Points V, VI, and VII, appellees will refute appellants' contentions: (1) that a division is a rate, fare or charge under Section 3(4) of the Act, and (2) that the acceptance of a division of an all-rail joint rate, which is lower than a local rate assessed on other traffic, constitutes discrimination under Section 3(4). The appellants did not raise this issue in their complaint to the Commission, nor did they seek leave to amend their complaint as permitted by the Commission's Rules of Practice. Moreover, they specifically waived the issue in oral argument before the Commission.

Whether a "division" is a "rate" or "charge" under Section 3(4) is primarily a question of law, but whether a difference in a division vs. a rate or charge constitutes discrimination is a mixed question of law and fact, which, in any event, would require a showing that the circumstances and the law under which each is established are the same.

While raising a number of issues and a variety of questions, counsel for the appellants made it exceedingly clear that they desire one and only one order—the establishment of through routes and joint rates. An order under Section 3(4), however, is an alternate order; it directs a party to remove the discrimination, it does not prescribe how it shall be done. A prescription of through routes and joint rates, can emanate only under Sections 15(3) or 307(d) which require a showing that the proposal is necessary or desirable in the public interest. In the final

analysis then, the reversal sought before this Court under Section 3(4) would neither solve the appellants' alleged difficulties nor be responsive to the primary relief sought by the complainant. The primary relief sought, through routes and joint rates, lies with the Commission, not with this Court.

## ARGUMENT

### I

**The evidence establishes and the Commission found that the local rate from East St. Louis to Danville was depressed below the normal level, and thus was neither excessive nor unreasonable.**

The appellants introduced no evidence in support of this issue. The railroads, however, showed that other rates on sulphur emanating from East St. Louis and Joliet were higher by several dollars per ton for comparable distances (Ex. 4, R. 116). The local rail rate of $2.95 per gross ton is only 9.2 percent of first class as compared with the general basis for rail rates on sulphur in eastern territory of 23.5 percent of first class (R. 95, 96). The Commission, Division 3, correctly concluded that the rail rates were on a depressed basis (R. 24), and *the appellants have not appealed that finding.*

Of course, the appellants originally contended that the present barge-rail *combination* was excessive and unreasonable. Since the rail rate of $2.95 is on a depressed basis, it is self-evident that an unreasonable combination could only stem from an excessive barge factor, *i. e.*, the local barge rate of $5.32 per gross ton from Galveston to East St. Louis. While the Commission held that the record would not support a finding that the combination was unreasonable (R. 30), it concluded with the observation

"that if any reduction in the barge-rail charge . . . is needed it ought to come out of the barge factor and not out of the depressed rail factor" (R. 33).

This is a particularly pertinent observation since, as appellees will hereinafter demonstrate under Point VII, the appellants' competitive difficulties arise from their own inflated local factor rather than from any action or inaction on the part of the railroads.

## II

**The evidence fails to establish that through routes and joint rates are necessary or desirable in the public interest.**

As complainants before the Commission, the appellants were required to bear the burden of proof. *Swift & Company* v. *United States*, 343 U. S. 373.

Section 15(3) of the Act provides in part as follows:

> "The Commission *may*, and it *shall* whenever deemed by it to be *necessary or desirable in the public interest* . . . establish through routes, joint classifications, joint rates, fares, or charges . . ."

The same language is expressed in Section 307(d) of the Act. These are the only sections of the Act in which these provisions are found, and it necessarily follows that the appellants must provide, by probative evidence, a basis which will enable or permit the Commission to act thereunder. The thought has been succinctly expressed by this Court in previous proceedings. Thus, in *Virginian Railway Company* v. *United States*, 272 U. S. 58, the Court stated at page 666:

> "The Virginian contends that the order is void because the Commission directed the establishment of through routes and joint rates without finding that

> they are necessary in the public interest. Such a finding is *essential* to the validity of an order under Section 15(3)."

The "public interest" has been defined by this Court as "not a mere general reference to public welfare, but . . . has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *Texas* v. *United States*, 292 U. S. 522, at page 531.

The appellants introduced no evidence of proposed economies or efficiencies, they did not challenge the adequacy of the transportation services available, nor did they contend that their proposal entails the best use of transportation facilities.

Appellants' testimony dealt with the service offered by the barge lines, the rail and barge rates (Exhibit 1), the distances involved, (Exhibit 2) and the composition of the joint barge-rail rate sought. No shippers, consignees, or other parties supported appellants' proposal.

The evidence indicated, moreover, that sulphur was moving freely via barge-rail under a contract carrier rate of $4.65 per gross ton as compared with appellants' inflated local rate of $5.32 per gross ton. Under these circumstances, the Commission concluded that the appellants' proposal was not required in the public interest (R. 31).

Appellants do not appeal this finding.

## III

**Neither Section 307(d) of the Act nor the National Transportation Policy requires the Commission to establish through routes or joint rates without probative evidence in support thereof.**

While the appellants originally contended that the railroads' refusal to join in a through route and joint rate was in violation of Sections 1 and 307(d) of the Act, they have, to all intents and purposes, abandoned this question. Section 307(d) requires the same showing of public interest found in Section 15(3), and their utter failure to make such a showing precluded any favorable possibilities on appeal. Appellants' appeal, therefore, is restricted to Section 3(4).

The United States, however, contends that the National Transportation Policy requires the Commission to establish through routes and joint rates with reasonable differentials under Section 307(d) of the Act.

Section 307(d), insofar as pertinent here, provides as follows:

> "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

We have already discussed appellants' failure to show the necessity or desirability in the public interest of a through route and joint rate. The Commission, moreover, found that there was:

> "no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate from Galveston and the suggested barge-rail rate from Galveston, or any particular differen-

tial, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation" (R. 30).

The statute, of course, expressly provides that the Commission may prescribe reasonable differentials in rail-barge joint rates only "in the case of a through route." No through routes exist via appellants and railroad appellees from Galveston to Danville, *Thompson* v. *United States,* 343 U. S. 549, and a through route is a necessary prerequisite to the establishment of a joint rate, *Western Pacific R. Co.* v. *Northwestern Pac. R. Co.,* 191 I. C. C. 127, 131; *Georgia & F. R.* v. *Atlantic Coast Line R. Co.* 191 I. C. C. 489, 499.

The statute, moreover, requires the Commission to prescribe "such *reasonable* differentials as it *may find to be justified.*" Manifestly, the Commission is required to make a finding of what is or is not a reasonable differential, and, like any other affirmative finding by the Commission, it must be supported by substantial evidence. *U. S. ex rel., Chapman* v. *Federal Power Commission,* 191 F. 2d 796, affirmed 73 S. Ct. 609.

What evidence has been adduced to support the prescription of a "reasonable" differential? The present barge-rail combination enjoys an existing differential of 91.4¢ per gross ton (R. 30), thus:

| | |
|---|---|
| All-rail—Galveston to Danville ..... | $9.184 |
| Combination barge-rail (5.32 + 2.95) .... | 8.27 |
| Differential ..... | $ .914 |

While the appellants did not participate in the traffic, at least previous to the hearing, it was not shown that their

failure to do so resulted from a difference in rail rates. It most certainly did not result from the application of the local rail rate of $2.95 per gross ton since the record shows that in the period covered by a movement study, the preponderance of the traffic was moving via *barge-rail.* It moved by a contract carrier barge, however, under a rate of $4.65 per gross ton, substantially less than either appellants' local rate of $5.32 or their suggested division of $5.41.

While some of the traffic moves all-rail, the Commission was simply left to speculate on the reasons why the traffic should move via one mode or the other. It may well be, in the case of the rail shipments, that the consignee desired smaller lots in regular service, or that he was faced with an emergency which demanded an immediate increase in supply. These and many other factors must be taken into consideration by the Commission in prescribing differentials between rail and water service. The appellants, however, supplied none of these details in support of their complaint.

No shipper or consignee appeared. The appellants' witness simply stated that he was "told" that appellants would "probably be able to get some sulphur from Galveston on that rate ($7.67) because of *some absorption* made of the * * * transportation charge, from Galveston to New Orleans" (R. 82). This is hearsay in its purest form and entitled to no weight whatsoever. Moreover, the simple statement could not possibly serve as the basis for a reasoned, well-informed finding.

What is or is not absorbed by the shipper at Galveston is not of record. It is only another and highly important factor upon which the Commission could only speculate. It is important, however, because to whatever extent the shipper absorbs a part of the barge transportation costs, the cost of such carriage to the consignee is reduced, and it is

the consignee who controls the routing of the traffic. Since the shipper does absorb *some* of the transportation, it is obvious that the apparent differential between all-rail and barge-rail of 91.4¢ per gross ton is, in fact, much greater.

Notwithstanding the complete absence of evidence required by the Act, the United States contends that the Commission is required to grant the relief sought by the appellants "in order to effectuate the National Transportation Policy" and preserve the "inherent advantages" of each form of transportation. In effect, the United States alleges that the National Transportation Policy, in and of itself, sweeps aside all other requirements of the Act and becomes the evidence of record. This is an untenable conclusion.

It is well established by decisions of this Court that orders of the Commission must be based upon the substantive transportation standards of the Interstate Commerce Act rather than upon mere general expressions of congressional policy. *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658; *United States* v. *New York Central R. R.,* 263 U. S. 603. The policy itself is simply a guide for the Commission in the administration of the Act. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 82.

The contention of the United States is based solely on the decision of this Court in *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567. As determined by the lower Court, however, "the facts there differ greatly from the facts here."

The *Mechling* case did not involve the establishment or refusal to establish through routes and joint rates. It dealt only with separately established proportional rates over which traffic was moving. These were components of existing through routes on which through combination rates applied. 330 U. S. 567, p. 570. Neither Section 15(3) nor 307(d) were involved. Section 307(d) was included

only in the discussion of the Congressional policy as construed by the Court (p. 574), concluding with the observation at page 577 that while the Commission is "authorized" to fix reasonable differentials, it is not authorized to neutralize the effective prohibitions of other provisions which are expressly designed to prohibit discrimination against water carriers.

This is a far cry from *requiring* the Commission to establish through routes and joint rates with reasonble differentials without the substantial evidence required by the Interstate Commerce Act and the Administrative Procedure Act. If the Commission's order cannot be supported under the substantive provisions of the Interstate Commerce Act, clearly then, it could not be required as a matter of law by a general expression of congressional policy. *Ann Arbor R. Co.* v. *United States, supra; United States* v. *New York Central R. R. Co., supra.*

The National Transportation Policy provides "for fair and impartial regulation of all modes of transportation * * * so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service." It does not command the Commission to favor the water carriers at the expense of other modes of transportation. Yet, that is precisely what appellants are contending here. A simple review of the record results in three obvious conclusions:

(1) At the time the appellants first commenced negotiations with the railroads, the preponderance of the traffic was moving via barge-rail. Thus it was not the all-rail rate with which appellants were beset. It was the competition from contract water carriers moving sulphur at $4.65 per gross ton over the barge-leg of the haul. This same situation has arisen in other proceedings before the Commission. (See *Crude Sulphur From Ohio To Ohio Points And Erie, Pa.* 293 I. C. C. 655, at p. 658). The appellants

do not choose to reduce their local rate to meet this competition, but seek instead a reduction in the railroad revenues through a joint rate out of which the railroads are to accept a division, less in amount than they received on the ex-barge sulphur then moving.

(2) The bargelines' usual "inherent advantage" is absent here. This traffic does not originate on the water. It requires a previous rail haul, transfer of lading from cars to storage bins, reloading from bins to barges, and from barges back into cars. Obviously, this is not the economical service and does not provide for the most efficient use of transportation equipment. The appellants here seek to attract inland traffic to unnatural and circuitous transportation by water. Manifestly, this was not intended by the Act, nor is the Commission required by the National Transportation Policy to encourage such service. Appellants are not entitled to preferred treatment and, under such circumstances, their proposal must stand on its own merits. If, indeed, the appellants desire to attract inland traffic, it should be done by adjusting their own rates, as the contract carrier obviously did, instead of seeking relief from the Commission in a reduction of rail revenues under the guise of public interest.

(3) The contention of the United States that the Commission cannot maintain barge rates at an arbitrarily high level and thus deny shippers the inherent advantage thereof, while true, has no application here. The appellants, not the Commission, are maintaining inflated rates on barge traffic and propose a further increase in barge revenue from $5.32 to $5.41 per ton. By their insistence upon maintaining the present level of barge revenues, appellants, and not the Commission, deny shippers the benefit of an unproven and extremely dubious "inherent advantage".

The appellants also contend that the Commission refused to order joint rail-barge rates solely because of the de-

pressed character of the local rail rate. Appellants thereby misstate the point. The Commission, recognizing that appellants' failure to participate in the traffic was due to the inflated barge factor rather than the depressed rail factor, concluded that the National Transportation Policy, in the fair and impartial regulation of all modes of transportation, did not, under these circumstances, require a further reduction in the depressed rail factor simply to permit appellants' participation in the traffic at increased revenues.

In *Alabama Great Southern Railroad Co.* v. *United States,* 340 U. S. 216, the Court considered an order of the Commission requiring rail carriers and barge lines to establish certain joint through routes and joint rates on prescribed differentials from higher all-rail rates. (*Rail and Barge Joint Rates,*[1] 270 I. C. C. 591).

The Court, in discussing the Commission's decision, noted that the barge lines, "in order to protect the sole advantage of their service to the public, are willing to accept less for their inferior service." 340 U. S. 216, at page 225. In the instant proceeding, however, the appellants actually seek an increase in the barge factor. The consignee presently has available a barge rate of $4.65 per gross ton. The appellants thus offer no additional benefits except increased revenues for themselves at the expense of the railroads.

This fact makes it extremely doubtful, to say the least, whether the inflated local barge rate reflects "adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service." In any event the appellants' attempt to increase their revenues at the expense of already depressed rail earnings is not in harmony with the Congressional directive "to provide

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[1] The order was based on a finding that such routes and rates were necessary and desirable in the public interest under Section 307(d), 270 I. C. C. 591, 616.

for fair and impartial regulation of all modes of transportation" and "to foster sound economic conditions in transportation".

## IV

**A carrier, having entered into one joint rate, is not, as a matter of law, required to so join with all other carriers in similar arrangements, and its refusal to do so is not unlawful under Section 3(4).**

Section 3(4) of the Act simply prohibits discrimination in rates, fares and charges between connecting lines. Whether or not discrimination exists in any given case is for the Commission to decide under all the pertinent facts. *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314. Discrimination exists, in any event, only where the circumstances of the case are shown to be similar in all material respects, for otherwise, no valid comparison exists.

Appellants and the United States cite a number of cases in which the Commission has ruled that discrimination exists, but these cases do not support the proposition contended for here as a matter of law. Each proceeding must be judged by the Commission on its own merits. In all of the Commission decisions cited, for example, through routes were there in existence, which is not the case here.

While the question proposed by the United States is restricted to joint rates, the appellants charge discrimination in entering into through routes. This merely serves to emphasize the distinction which must be made. Section 3(4), insofar as pertinent, deals solely with "rates, fares and charges". It contains no reference to through routes or the absence thereof. As the appellees have previously pointed out, the existence or non-existence of a through route does not depend on the rates or charges applicable thereto, *Thompson* v. *United States, supra,* and the establishment of joint rates is an act entirely separate

and distinct from the establishment of through routes. *United States* v. *Great Northern Railway Co.*, 343 U. S. 562, 573.

Neither the Court nor the Commission is empowered to prescribe or enforce the establishment of joint rates under Section 3(4) since, as appellees have previously pointed out, a through route is a necessary prerequisite to the establishment of a joint rate. *Western Pacific R. Co.* v. *Northwestern Pac. R. R. Co., supra.*

Since the Act does not comprehend the establishment of joint rates in the absence of through routes (See Section 307(d), for example), it necessarily follows that the existence of joint rates over through routes as against the absence of joint rates where no through routes exist does not constitute discrimination prohibited by Section 3(4). *Western Pacific R. Co.* v. *Northwestern Pac. R. Co., supra.* The appellants, in effect, contend that when a railroad enters into one arrangement voluntarily in the exercise of its discretion, it thereafter has no discretion and must, under all circumstances, make the same arrangements with all other carriers. In the *Western Pacific* case, *supra,* the Commission dealt with a similar contention thus:

> "Therefore (under the facts) the refusal of the Northwestern Pacific to participate with the Western Pacific in joint rates to the extent it participates in joint rates with the Southern Pacific cannot be said to be in violation of Section 3(3) [now 3(4)]. A carrier may voluntarily enter into an arrangement where it is short-hauled, but we are without power to require it to do so." Page 135.

It necessarily follows that while carriers may enter into voluntary arrangements which might or might not be required by the Commission, they are not, as a matter of law, thereafter required to make similar arrangements with all other carriers.

The requirement of an existing through route is aptly demonstrated in the *Ogden Gateway* case, now before this Court on separate appeals in Nos. 117, 118, 119. While it would be inappropriate to comment on the merits of these cases, it is clear from the Commission's decision, *Denver & R. G. W. R. Co.* v. *Union Pacific R. Co.*, 287 I. C. C. 611, that it considered through routes of primary importance, thus at p. 615:

> "The first question for our determination therefore, is whether or not the present routes by way of the Ogden Gateway constitute 'through routes' ".

It will be noted that in the cases cited by appellants, the findings under Section 3(4) refer solely to rate, not *routes*.

Appellants thus attempt to bypass the restriction of "public interest" placed on the Commission itself by Section 15(3) in directing the establishment of through routes and joint rates. Discrimination, moreover, implies a comparison of like with like, and for another carrier to establish discrimination in the existence or non-existence of joint rates, it would be incumbent upon the proponent to establish that the joint rates it desires are *also* "necessary or desirable in the public interest", for otherwise there is no similarity of conditions for comparison.

The through routes and joint rates sought herein by appellants, of course, do not provide for the entire movement, as do the all-rail routes and rates. The latter embrace the entire movement from the Texas mine to the consignee, whereas the appellants seek routes and rates which apply only after a previous rail haul and transfer of lading at Galveston.

It should be recognized that the appellants were seeking through routes and joint differential rates before the Commission, whereas before this Court they base their question on simple "joint rates". There is a substantial dif-

ference between the two. Appellants ought not be allowed to present one question to the Commission and subsequently urge a different question in this Court as reversible error.

## V

**The question whether discrimination is created by the application of a division as opposed to a higher local rate was not raised before the Commission and cannot be urged as reversible error on appeal.**

Whether the "division" of a joint rate is a "rate, fare, or charge" under Section 3(4) of the Act is a simple question of law, and this query clearly must be answered in the negative.

Appellants' argument assumes, contrary to fact, that a division and a local rate represent compensation to the railroad *for the same service*. With this assumption the question becomes an issue of *law and fact* which must first be presented for the *expertise* of the Commission. There was no evidence, pro or con, on that issue, and correctly so, since none was called for by the issues raised in the complaint.

Appellants contend that the issue was covered in their complaint before the Commission by the allegation that "defendants are maintaining rates and charges which are discriminatory against complainants." The Commission's Rules of Practice make this contention untenable.

Rule 28 of the Rules of Practice states, in part, that:

> "A formal complaint must be so drawn as *fully and completely* to advise the parties defendant and the Commission in what respects the provisions of the act have been and are being violated, and should set forth briefly and in plain language *the facts claimed to constitute such violation.*"

Rule 30(a) additionally provides:

> "A complaint that alleges the act is violated because of an * * * unjust discrimination should specify clearly *the particular elements stated in the act as constituting such violation* and the *facts which complainant relies upon to establish it.*"

The *facts* relied upon by appellants in their complaint are set out in Paragraph III thereof. The only discriminatory treatment there alleged is the matter of through routes and joint differential rates. There is no mention of divisions. The appellants' witnesses did not testify upon the subject of divisions versus local rates. The fact that the division was lower (which is usually the case) did not appear until later.

Realizing, after the decision of Division 3, that their evidence was woefully inadequate to justify the relief sought, appellants confined their Petition for Reconsideration to the single point of divisions versus local rates. On oral argument, however, they returned to their original contentions, admitting that they had not originally raised the "division" issue, thus (R. 147-148):

> "I don't believe that is really one of the issues of our complaint."

Of course, after the hearing, if they then intended to seriously urge the question before the Commission, they could have sought leave to amend their complaint under Rule 20 of the Rules of Practice or petitioned the Commission for further hearing. Appellants made no attempt to avail themselves of these further administrative remedies.

The authorities are unanimous in that a question either waived or not raised before an administrative body cannot and will not be considered on judicial review of the

agency's action. *United States* v. *Baltimore and Ohio R. R. Co.*, 231 U. S. 274; *United States ex rel. Coltman* v. *Bullock*, 110 F. Supp. 126.

## VI

**The "division" which a carrier receives out of a joint rate is not a "rate, fare, or charge" under Section 3(4) of the Act.**

It is an elementary principle of statutory construction that technical terms when used in a statute are presumed to have been used with their technical meaning. *Hawley* v. *Diller*, 178 U. S. 476. "Division" as used in the Interstate Commerce Act is a technical term, denoting the share which a carrier receives as its *portion* of a joint rate. *St. Louis S. W. Ry Co.* v. *United States*, 245 U. S. 136.

"Rates, fares, or charges" have also been recognized by this Court as technical terms in the Interstate Commerce Act, *Detroit, G. H. & M. Ry. Co.* v. *Interstate Commerce Commission*, 74 F. 803, aff. *Interstate Commerce Commission* v. *Detroit, G. H. & M. Ry. Co.*, 167 U. S. 633. The Court of Appeals therein found, contrary to appellants' contention, that "charges" as used in the Act denotes "segregated items of expense or dues which are to be demanded by the carrier for any service in connection with the transportation, or with the receiving, delivering, storage, or handling of goods."

The very language of the Act requires the appellants' question to be answered in the negative. Divisions are, when referred to, specifically designated. Many sections of the Act refer to rates, fares, and charges. Comparatively few deal with divisions. It will be noted, for example, that Section 6(1) of the Act [63 Stat. 486, 49 U. S. C. 6] requires the publication of schedules showing all "rates, fares, and charges." There is no similar requirement for divisions. *Chase & Co.* v. *N. Y. C. R. R.*, 161

I. C. C. 614. While Section 1(4) of the Act requires "just and reasonable rates", it requires the establishment of "just, reasonable and *equitable* divisions of joint rates." This distinction carries on throughout the Act. Thus, while Section 3(4) deals with discrimination in rates, fares, or charges, Section 15(6) provides that the Commission may prescribe *divisions* of joint rates, fares and charges when it "is of the opinion that the divisions of joint rates, fares, or charges * * * are or will be unjust, unreasonable, inequitable, etc." This section also sets out certain standards which must be followed in prescribing divisions, failure to observe which invalidates the Commission's order. *Brimstone Railroad and Canal Company* v. *United States, et al.*, 276 U. S. 104. Substantially the same language is contained in Section 307(e) of the Act.

The only case cited in support of appellant on this point is the Commission's decision in *Western Pacific Co.* v. *Southern Pacific Co.*, 55 I. C. C. 71, 81. Two brief observations disqualify this case as a substantial precedent:

(1) Through routes and joint rates were then in existence. The dispute arose because of alleged discrimination between divisions, not between divisions and rates;

(2) The decision was issued in 1919, whereas Section 15(6), setting out the Congressional directives on the subject was enacted in 1920. This was a substantial change in the law. Prior thereto, there was considerable doubt as to the extent of the Commission's authority over divisions, "and the Transportation Act, 1920, undertook by Section 15(6) to remove doubts which had arisen". *New England Divisions Case*, 261 U. S. 184, 194.

With the Transportation Act of 1920, the Congress authorized the Commission to deal with divisions in one

and only one way. A legislative affirmative description of powers conferred implies denial of nondescribed. *Continental Casualty Company* v. *U. S.*, 314 U. S. 527.

## VII

**The inherent differences between divisions and local rates preclude a finding of unlawful discrimination by a simple comparison of the two.**

In its earliest decisions, the Commission has held that divisions are unlike and not comparable to rates, fares and charges. *Board of Trade of Troy, Ala.* v. *A. M. Ry.*, 6 I. C. C. 1, 23. As a rule the division of a carrier on through business is less than its local rate between the same two points, *Gump* v. *B. & O. R. R.*, 14 I. C. C. 98, 105, and a division of a joint rate which the carrier accepts as its proportion is not a test of the lawfulness of its separately established rates. *Bituminous Coal to Youngstown*, 163 I. C. C. 3, 12.

This proposition has been approved by the Court. In *Texas and Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, the Court stated at page 239:

> "The mere fact that the disparity between the through and local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted unjust discrimination."

This principle was confirmed in *Parsons* v. *Chicago & Northwestern Ry.*, 167 U. S. 447. To the same effect are *Tozer* v. *United States*, 52 F. 917, and *Chicago & Northwestern Ry. Co.* v. *Osborne*, 52 F. 912, cert. denied, 146 U. S. 354. In the *Tozer* case, the court stated at page 916:

> "Again, at the time of the passage of this act, joint through tariffs were well known, as well as the fact that they were generally less than the sum of the local

> tariffs * * * if Congress had intended to make the local tariff subordinate to or measured by the joint tariff, its language would have been clear and specific."

Again, as stated by the Supreme Court in the *Abilene Divisions Case*, 265 U. S. 274, at page 284:

> "It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system,' provided the share left to its connections is 'adequate to avoid a confiscatory result.' "

All of the cases cited by appellant in support of its proposition were decided prior to the enactment of Section 15(6).

Appellants admit that a shipper cannot complain of divisions since he is unconcerned about the apportionment of the through rate, but they allege that they are, as a matter of law, entitled to have no greater charge applied to traffic moving beyond their lines than the carrier beyond accepts as a portion of a through rate. In this respect they place great reliance on *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. In that proceeding, however, there was no question of joint rates or divisions. The traffic there was moving on through rates which were combinations of "distinctly separate" rates. The Court was comparing *separately established and published proportional rates*, which, as we have previously pointed out, are inherently different in nature from divisions.

At pages 14-15 of the *Statement As To Jurisdiction*, appellants themselves recognize that the *Mechling* case does not govern the proceeding here, but allege that the

Commission's decision is contrary to the *spirit* of the Court's decision in that it is based on form rather than on substance. Continuing with this line of reasoning, appellants *recognize and admit* (Brief for the Appellants, pp. 45-46) that the Commission is empowered by Section 15(6) to fix "*varying divisions between different carrier connections for similar services via the same gateway between the same points*" which "are *not prohibited* by Section 3(4);" they contend, however, that it is unnecessary to reach this question.

In other words, they urge the Court to make a comparison without examining the factual and legal nature of the matters compared. The simple comparison of unlike objects, of course, establishes nothing. It cannot result in any valid conclusion.

Some of the different circumstances surrounding divisions are discussed by the Court in *New England Divisions Case*, 261 U. S. 184, at p. 195:

> "The argument is that a division * * * is essentially a partition of property; that the rate must be divided on the basis of the services rendered * * * But the argument begs the question. What is its just share? —It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission * * * at what that board finds to be just, reasonable, and equitable * * * It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate."

Furthermore, as a matter of common sense, the two are not comparable. A carrier may, subject to the Commission's approval, establish whatever rate it desires between any two points on its own line, but in entering into joint rates, it has no such freedom. The matter be-

comes one of negotiation, having in mind the provisions of Section 15 (6). One of the considerations in Section 15 (6), it will be noted, is "whether any particular participating carrier is an originating, intermediate, or delivering line." Certain rail lines in the southwest originate this traffic; appellants do not.

In view of the substantial difference in the nature of divisions as opposed to rates, it is clear that a simple comparison of the two cannot result in any valid conclusion as to the lawfulness of either. Since it is the comparison itself which is invalid, it is obviously immaterial whether the party seeking the comparison is a shipper or a carrier.

Appellants, as previously noted, admit that the Commission could fix varying differentials for similar services between the same points. Obviously then, a division may legally vary from the local rate between the same points. The conclusion inevitably follows that a difference shown by a simple comparison between the two *does not establish discrimination as a matter of law,* and cannot, therefore, be relied upon as reversible error here.

There is much to suggest that appellants are not truly interested in the question of rates versus divisions, for it does not, by their own admission, provide the solution to their alleged difficulties. It is the appellants' insistence on maintaining their inflated barge factor that prevents their participation in the traffic. This is convincingly demonstrated by the statement of appellants' counsel at the oral argument that while the prescription of a proportional in the amount of the rail division would remove the alleged discrimination, it was not what the barge lines desired (R. 147-148). Such a rate, moreover, would also be available to the traffic of all carriers not parties to joint rates. Thus, the appellants (for whom the alleged discrimination would have been cured by their own admission) would still be faced with the same and only difficulty they faced at the beginning—a barge contract carrier rate substantially below their own.

Under the guise of "public interest" appellants sought the establishment of a through route and joint barge-rail rate which would permit them to compete with the barge contract carrier at the expense of the railroads.

The Commission refused to aid in such a gross perversion of the National Transportation Policy. The Court below, on the merits, did likewise. This Court should do no less.

## Conclusion

The judgment of the lower court should be affirmed.

Respectfully submitted,

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## Proof of Service.

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, John A. Daily, attorney for certain appellees on whose behalf the foregoing Brief is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with air mail postage prepaid to:

   Honorable Simon E. Sobeloff
   Solicitor General of the United States
   Department of Justice
   Washington 25, D.C.

   Honorable Stanley N. Barnes
   Assistant Attorney General
   Department of Justice
   Washington 25, D.C.

   Daniel M. Friedman
   John Bodner, Attorneys
   Department of Justice
   Washington 25, D.C.

   Malcolm R. Wilkey
   United States Attorney for the Southern District of Texas
   Room 205, Post Office Building
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2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with air mail postage prepaid to:

Robert Ginnane
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Interstate Commerce Commission
Washington 25, D.C.

3. On Dixie Carriers, Inc., Coyle Lines, Incorporated, American Barge Line Company, and Federal Barge Line Company by mailing copies in duly addressed envelopes with airmail postage prepaid to:

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This, the 9th day of March, 1956.

JOHN A. DAILY